No. 18916

In the

United States Court of Appeals

For the Ninth Circuit

KINCAID & KING CONSTRUCTION COMPANY, INC., a corporation,
Appellant,
vs.
THE UNITED STATES OF AMERICA, for the use of WILLIAM OLDAY; CONTINENTAL CASUALTY COMPANY, a corporation; and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellees.

On Appeal From The
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BRIEF FOR APPELLANT

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SUBJECT INDEX

No. 18,916

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SUPPLEMENTAL JURISDICTIONAL STATEMENT

This is an action brought under the Miller Act (Title 40 U.S.C.A. §270(b) by the appellee, William Olday against the appellant, Kincaid & King Construction Company, Inc. and Anchorage Builders Inc. and their bonding company, United States Fidelity and Guaranty Company on October 29, 1956. (Record on Appeal p. 1-7).

A judgment was duly entered on October 23, 1958 in the District Court for the District of Alaska, Third Division at Anchorage, in favor of the appellee, William Olday, and against the defendants; Kincaid & King Construction Company, Inc., United States Fidelity and Guaranty Company and Anchorage Builders, jointly and severally, in the total sum of $30,000.00, plus attorneys' fees in the amount of $2,000.00 plus interest at the rate of six percent (6%) per annum from date of entry. An appeal was taken from that judgment by the appellant, Kincaid & King Construction Company, Inc. to this court. That appeal was dismissed by opinion of this court in No. 16,519 on February 21, 1962 on the grounds that no final judgment had been entered since there was no disposition of the appellant's counterclaim. The case is cited as Kincaid & King Construction Company v. United States, 299 F. 2d 787 (9th Cir. 1962.) A hearing upon the remand of the case took place at Anchorage, Alaska before the Honorable Harry C. Westover, United States District Judge on May 27, 28 and 29, 1963. A supplemental judgment and supplemental findings of fact and conclusions of law were entered on May 29, 1963. From this judgment, the appellant filed a timely notice of appeal to this court on June 22, 1963. Jurisdiction of the court below was conferred

under provisions of §270(b), Title 40, U.S.C.A. Jurisdiction in this court is conferred by 28 U.S.C.A. 1291.

SUPPLEMENTAL STATEMENT OF CASE

This statement of facts is supplemental to the statement of the case contained in appellant's opening brief in No. 16,519. A hearing upon remand of this case occurred at Anchorage, Alaska on May 27, 28 and 29, 1963. At this hearing upon remand, the trial judge refused to entertain any evidence whatsoever on the appellant's counterclaim against the appellee, William Olday. Appellee, Continental Casualty Company, moved that since the cause had been fully tried, there was no occasion for the taking of any further testimony and that the court merely enter appropriate findings of fact and conclusions of law and a supplemental judgment denying the counterclaim of the appellant, Kincaid & King, (Tr. of Hearing Upon Remand, p. 22, lines 22-25; p. 23, lines 1-20.) The appellees, Olday and United States Fidelity and Guaranty Company, joined in this motion. The trial court indicated that he had prohibited appellant's counsel at the previous trial from introducing testimony relative to the appellant's counterclaim. The court said during hearing for remand:

"THE COURT: Counsel, that's not entirely correct because Mr. Arnell on several times attempted to introduce

> testimony relative to this counterclaim and I refused to allow the testimony to come in. The record will show that I refused to allow it. However, I think testimony was introduced but the record shows that I refused to allow him to introduce it.
>
> MR IVERSON: I think it was introduced Your Honor and it went on for some time.
>
> THE COURT: And Mr. Arnell always took the position that he wasn't given the opportunity to present that issue to the Court." (Tr. of Proceedings on Remand, p. 23, lines 21-25, p. 24, lines 1-5.)

Appellant made a motion at the hearing on remand to the trial court to reconsider the admission of appellant's exhibits "W" and "U" for identification. (Tr. 51, lines 10-15.)

The appellant also made at the request of the court an exhaustive offer of proof of the matters which appellant wished to present in support of its counterclaim against the appellee, Olday (Tr. on Remand, pp. 121-124.)

The trial court in the proceedings on remand indicated that he had no jurisdiction to change the findings or the

judgment as those findings and judgments had become final. (Tr. on Remand, p. 115, lines 6-8.)

The trial court refused to go into the matter of the third party complaint on the basis that the third party complaint was directed only against Continental Casualty Company and that since liability had to be first established on the complaint against the principal, Olday, that the third party complaint had to be dismissed. The court said in this regard as follows:

> "This third party complaint was directed only against the Continental Casualty Company as third party defendant and this third party complaint should have been dismissed, and it was dismissed." (Tr. on Remand, p. 90, lines 18-21.)

Appellant filed timely objections to the supplementary findings of fact and conclusions of law. (See record on appeal, p. 180-184.) These objections were overruled by the trial court. (Tr. on Remand, p. 152, lines 11-16.) The trial court rejected any proof on the appellant's counterclaim on the grounds that he distrusted the records, and also because the appellant went back and reviewed their records to see whether or not they couldn't build up an offset against

Olday's claim. This appeared to be the only basis for the denial. The court said as follows:

> "THE COURT: Well, counsel, I've had considerable experience relative to accounting and bookkeeping methods, and if Mr., if Kincaid and King had kept a book of accounts in which it had a ledger sheet, and in that ledger sheet had put in from time to time the amount of the back charge, I probably would have accepted it. But you see, they didn't have any record at all. All they did, they, their books didn't show any record. All they did is when this complaint was filed, then they went back and reviewed their records to see whether or not they couldn't build up an offset against this claim, which they did. And I think I had a right to disregard and distrust that record. I'm still of the opinion that I should have distrusted it and consequently it was in my prerogative not to consider it." (Tr. on Remand, p. 141, lines 8-20.)

It should be noted that at the time of the hearing on remand, that a substantial portion of the back records for exhibit "U" had been burned subsequent to the litigation. (Tr. 137.)

The appellant's offer of proof and motion to reconsider the admission of certain exhibits were denied and supplemental judgment and findings of fact were duly entered. (Tr. on Remand, p. 152.)

QUESTIONS PRESENTED

1. Was finding of fact X erroneous in any particular?

2. Was finding of fact XI erroneous in any particular?

3. Was finding of fact XII erroneous in any particular?

4. Was the trial court erroneous in finding that the appellant caused extra work by failing to stake the area where the appellee, Olday, was required to work?

5. Was supplemental finding of fact I erroneous in any particular?

6. Was supplemental finding of fact II clearly erroneous in any particular?

7. Was supplemental finding of fact III clearly erroneous in any particular?

8. Did the trial court commit reversible error in refusing to entertain evidence on appellant's counterclaim?

9. Did the trial court on remand properly dispose of appellant's counterclaim as required by this court in its opinion filed February 21, 1962?

10. Was it error for the trial court to refuse any evidence on appellant's counterclaim because the amount of the counterclaim was compiled after the original litigation commenced?

11. Was it error for the trial court to dismiss the appellant's counterclaim with prejudice?

12. Was it error for the trial court to dismiss appellant's third party complaint with prejudice?

SUPPLEMENTAL SPECIFICATIONS OF ERROR

1. The appellant adopts the specifications of error set out in appellant's opening brief in No. 16,519 and incorporates the same herein by reference.

2. The trial court erred in refusing to admit into evidence on appellant's motion to reconsider the court's previous rulings at the original trial defendant's exhibits "U" and "W" for identification. (Tr. of Hearing upon Remand, May 27-29, 1963.) The following motion was made at page 51, lines 10-15, Transcript of Hearing upon Remand as follows:

> "MR BONEY: Your honor, I would like to respectfully submit that the rejection of defendant's exhibit "W" for identification and defendant's exhibit "U" for identification

which were never admitted into evidence should be reconsidered and that the grounds stated by the Court would only go to the weight and not to the admissibility."

The court disposed of the matter as follows:

"THE COURT: Well, now counsel, this is not a new trial and this case has not been opened up for any additional testimony. This is not a motion--we have no motion for a new trial. In fact a motion for a new trial is too late and the Court, the Circuit Court hasn't ordered a new trial. The Circuit Court has only said, "you haven't made any finding relative to the counter-claim and so till you do we don't have any jurisdiction."

Appellant's trial counsel retorted:

"MR. BONEY: Well, if the Court, maybe I was misled by the letter of the Court which advised me that additional testimony would be taken on the counter-claim. I must confess."

The Court retorted as follows:

"THE COURT: Well, I probably should have said additional testimony will be taken if I find it's necessary."

3. The trial court committed reversible error by refusing to allow appellant, Kincaid & King Construction Company, Inc. to introduce any evidence on its counterclaim during the hearings which commenced May 27 and ended on May 29, 1963, at Anchorage, Alaska and by rejecting the appellant's offer of proof. The offer of proof was requested by the court. (Tr. of Hearing upon Remand, p. 121, lines 19-25.) The following offer of proof was made:

> "THE COURT: Well now, may I ask you to do this. Assuming that I would reopen this matter and allow you to produce additional testimony. Would you make an offer of proof now as to what testimony you will introduce and point out where it was not introduced in the record? Now what testimony do you want to introduce here. Let's have an offer of proof here."
>
> The appellant then made the following offer of proof:
>
> "MR. BONEY: We would your Honor make an offer, we would bring Mr. Smith back to the stand and he would continue his testimony concerning exhibits "W" and exhibits "U" and exhibit "W".
>
> THE COURT: May I see exhibit "W" and exhibit "U", you've referred

to them two or three times. Let me take a look at them and see what they are.

MR. BONEY: Exhibit "U" by the way goes to the, goes to liability on the counterclaim despite Mr. Josephson's statement to the contrary. They're weekly job site reports. We have other backup evidence in the record, E-1, 2 and 3. We will hand up exhibit "W" and this would be in the nature of an offer of proof. This is the amount of our delay damage, this is the break-down of our delay damage. "W" is based on the, in part on the Government inspection reports. And we would also prove, we would prove that the delays of Olday and breaches of the subcontract by Olday caused our client an additional $49,171.57 and it is broken down on exhibit "W". And then we would present additional proof showing that we would have incurred damages in addition to that amount in the amount of $27,360.00 as the result of additional overhead and engineering costs resulting from Olday's failure to complete the agreed time schedule. Mr. Smith who was the project manager would bring such necessary evidence as would be necessary to support those claims and would give

such additional testimony as to having to maintain supervisory personnel on the job, additional bookkeeping, and additional expense items during the period in which the delay occurred. And it should be noted that this amount does not include the charge backs that we have on O-1 I believe. We would probably also present George Hedla who is the witness and present custodian, who is the accountant for the defendant corporation Kincaid and King, and ah, to bring such company records that would be necessary to substantiate the $27,360 figure. And we maintain that the fact, as Mr. Arnell pointed out to the Court at 1103, he said--the Court said, "Sustained. Well he figured up a back charge of $49,171.51. He figured it up from his records but he didn't figure it up until after the litigation started." Mr. Arnell, "I concede Your Honor, that might go to the value of the weight of the evidence but certainly would not go the admissibility. And again Your Honor I would renew my offer of these documents to the Court." An objection sustained and apparently somebody, Mr. Arnell I think said, "I didn't hear an objection." And

> the Court said, 'Well, I'll object. If he didn't object he should have objected and so I'm going to sustain it anyway.' And we feel that proof has been cut off."

The trial court indicated that he would not admit the evidence and would stand by his former ruling despite the offer of proof. (Tr. of Hearing upon Remand, p. 129, lines 14-19, p. 130, lines 15-23, p. 141, lines 8-20.)

4. Finding of fact X is clearly erroneous in the following particulars:

In this finding, the appellee, Olday, was allowed and paid an "extra" by the appellants for the work covered by this award at the rate of $1.00 per cubic yard, which was in excess of the subcontract rate of $1.33 per cubic yard for excavations. (Tr. 1095, 1096.) This particular portion of findings of fact X is unsupported by evidence of record and should be set aside as erroneous. It is also erroneous for the further reason that the appellee, Olday, was bound by unit prices in a prime contract as estimated quantities were not exceeded by 25 percent.

This finding of fact was also erroneous in that the court awarded appellee, Olday, the sum of $422.00 for removing frost boils at the officers' mess

parking lot, back filling and recompacting. This award was based on the difference between the sum of $1,078.00 allowed and paid by appellant and the sum of $1,500.00 which the court deemed reasonable for the work. The allowance and payment made by the appellant to Olday was based on yardage prices in the subcontract and on an equivalent rental basis. (Tr. 1092, 1093, and 1094.) This finding in this particular is contrary to finding of fact VIII which found that the quantities approved by the government surveys were in fact quantities furnished by the appellee, Olday. This finding is erroneous in that the quantities furnished by the appellee, Olday, did not exceed the quantities specified in the contract by 25 percent and contract prices thereby prevailed. This finding was also supported by competent evidence of record. That portion of finding of fact X which allowed the appellee, Olday, the sum of $7,396.00 out of an award of $36,980.36 on allowance 106 made by the government to the appellant on an arbitrary formula which had no basis whatsoever in fact. This finding is erroneous in that the trial court in arriving at this allowance took a ratio on the appellee, Olday's subcontract price to the prime contract price and multiplied that by the award to the appellant and came out with

the award to Olday. Appellee, Olday, was not entitled to any portion of this claim because he had been paid for the work he had performed in accordance with the subcontract and most of the items had nothing to do with his work. (Tr. 1080 et seq.)

5. Finding of fact XI is clearly erroneous. This finding is not supported by competent evidence of record. Appellee, Olday, knew or had reason to know the time schedule for installation of the heater posts and the location of the heater posts, by an examination of the plans and specifications. (Tr. 1111.) Appellee, Olday, admitted that he could drive his equipment between the heater post and estimated that they were 20 feet apart. (Tr. 1175, 1181.) Olday could have anticipated the heater post situation and made his plans accordingly. Olday should be precluded from the allowance contained in finding of fact XI for the reason that he did not examine all the available drawings and plans concerning the prime contract. (Tr. 1181.) By implication, the trial court erred in finding that appellee, Olday, had no obligation to examine the plans and specifications despite the terms of his subcontract. (Tr. 1182.) This finding is erroneous for the further reason that there is insufficient evidence that the appellee, Olday, was in fact delayed in his work.

6. Finding of fact XII is clearly erroneous in that the trial court disallowed $5,000 of the back charge for curb area compaction in the amount of $8,182.53 on exhibit O-2. This portion of the finding was based upon no competence evidence showing that the back charge was unreasonable. This finding could not be supported by the time cards and records supplied by the appellant. (Tr. 1056-1058.)

Finding of fact XII is further erroneous for the reason that the trial judge disallowed a back charge for services rendered against Olday to the extent of $8,000.00 when such a disallowance was based upon insufficient evidence. This portion of the finding is erroneous because the trial court ignored the fact that the appellant supplied services to the appellee, Olday, in the season of 1956 which included cost of paying payrolls, cost of disbursing funds, interest on money advanced, presentation of weekly and monthly payrolls to the government, handling Federal and territorial withholding taxes for Olday's employees, and paying these taxes with appellant's funds, handling social security tax reports for Olday's employees and paying the taxes out of appellant's funds, preparation of territorial unemployment compensation reports and paying unemployment compensation contributions out of appellant's funds,

and performing all work in connection with payrolls of appellee, Olday.

7. Supplemental finding of fact I is erroneous in that the court cannot make a finding that the appellant, Kincaid & King, is entitled to no offsets and back charges without taking into consideration the basis of appellant's counterclaim against appellee, Olday. Moreover, this finding that appellee, Olday, substantially performed his subcontract is contrary to the clear weight of the evidence, in that Olday was guilty of delay and improper performance of his subcontract as is shown by the clear weight of the evidence.

8. Supplemental finding of fact II is clearly erroneous in that the court cannot make such a finding as to the reliability of the considering of appellant's evidence without first hearing, admitting and considering the same. The finding of fact is also erroneous in that the fact that the amount of the counterclaim or "back charges" in the amount of $49,171.57 were actually computed after the litigation began. This fact would only affect the weight and not the admissibility of this evidence. This finding is further erroneous because the trial court refused to consider all competent and material evidence relating to appellant's counterclaim.

9. Supplemental finding of fact III is clearly erroneous in that the trial court could not make such a finding without entertaining all evidence offered by the appellant, Kincaid & King, in support of its counterclaim. Also, this finding is premature because the trial court had failed to abide by the mandate of this court which required the trial court to dispose of appellant's counterclaim. This finding is also contrary to the clear weight of the evidence.

10. The trial court erred in its supplemental judgment in dismissing with prejudice the appellant's counterclaim and third party complaint.

11. The trial court committed error by refusing to properly dispose of appellant's counterclaim as required by this court in its opinion filed February 21, 1962.

12. The trial court erred in ruling that it would not entertain the counterclaim because the amount in the counterclaim was compiled after the original litigation commenced.

SUMMARY OF ARGUMENT

The trial court refused at the hearing on remand to entertain evidence on appellant's counterclaim in the following particulars:

1. By refusing to grant appellant's motion to reconsider the admission into its exhibits "U" and "W" for identification.

2. By refusing to allow appellant to call witnesses in support of its counterclaim against appellee, Olday.

3. By holding that since amount of counterclaim was compiled after litigation commenced that evidence concerning it was inadmissible.

4. By finding that the evidence on the counterclaim was unreliable and incredible without first hearing and considering evidence offered.

The trial court on remand failed to dispose of appellant's counterclaim as directed by this court for the reason that it could not dispose of the counterclaim without receiving evidence thereon.

Supplemental specifications of error numbers 4, 5 and 6 are argued in appellant's opening and reply briefs which are on file. The supplemental specifications are set out here to insure compliance with this court's rules 18 and 19. This argument merely supplements the argument made by the appellants in their opening and reply briefs which have been heretofore filed in this court in cause No. 16,519.

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO ENTERTAIN EVIDENCE ON APPELLANT'S COUNTERCLAIM AGAINST OLDAY AT THE HEARING ON REMAND.

The trial court refused to entertain evidence on the counterclaim on the premise that the counterclaim was based upon records which were segregated and produced after the litigation commenced. The trial court persisted in its refusal to reconsider evidence on the same basis which it refused to receive evidence at the time of the original trial. (Tr. 1206, lines 6-14; Tr. on Remand, p. 141, lines 8-20; Tr. on Remand, p. 152, lines 11-16; Supplemental Finding of Fact II.)

The trial judge was apparently of the opinion that Mr. Arnell, appellant's counsel at the first trial, had not abandoned proof on the counterclaim as argued by the appellees on the previous appeal. (Tr. on Remand, p. 23, lines 21-25, p. 24, line 1.)

The trial judge on the hearing on remand, after hearing an offer of proof, refused to hear further testimony concerning the counterclaim. The trial court wasted the better part of three days without hearing any evidence

whatsoever and then summarily entering supplemental findings of fact and conclusions of law and a supplemental judgment.

Since the trial judge clearly indicated that he would not consider any evidence on the counterclaim, it is now apparent that the appellant's deceased counsel, Mr. Arnell, never abandoned the counterclaim. It is also clear, that a new trial must be granted to the appellant so that it may prove its counterclaim against the appellee, Olday. The reasons for rejection and dismissal of the counterclaim are erroneous. The trial judge should have considered evidence presented by the appellant and then after due deliberation made appropriate findings on the basis of the evidence. Therefore, this court has no alternative but to reverse this cause to the United States District Court for the District of Alaska with directions that the appellant be afforded a new trial on its counterclaim and also on its third party complaint against the appellee, Continental Casualty Company.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO DISPOSE OF APPELLANT'S COUNTERCLAIM AS REQUIRED BY THIS COURT IN CAUSE NO. 16,519.

The trial court could not properly have ruled upon appellant's counterclaim without entertaining evidence on the same. The dismissal of the counterclaim with prejudice after hearing no evidence was error. Therefore, this court has no alternative but to reverse and remand this cause to the United States District Court for the District of Alaska with appropriate directions.

CONCLUSION

For the reasons stated in this brief and in appellant's opening and reply briefs in No. 16,519, this cause should be reversed and remanded to the United States District Court for the District of Alaska.

Dated at Anchorage, Alaska, this 26th day of October, 1963.

Respectfully submitted,

BURR, BONEY & PEASE

By: G. F. BONEY

APPENDIX OF EXHIBITS

Plaintiff's Exhibits

No.	Accepted	Rejected
38	22	
19	58	
6	61	
30	128	
31	146	
17	147	
37	152	
13	163	
16	164	
14	164	
29	165	
35	166	
11	169	
9	172	
4	179	
5	180	
7	183	
22	186	
23	188	
24	188	
25	189	
32	190	
18B	204	
33	1172	

Defendant's Exhibits

No.	Accepted	Rejected
J	28	
K	28	
D-1	148	
D	150	
C	256	
O-1	273	
AD	330	
12-A	591	
E	671	
AH	801	
E-2	813	
O-2	904	
N	932	
E-3	988	
AG	1046	
AJ	1048	
AK	1052	
AM	1064	
AE	1078	
AN	1080	
AB	1169	
AO	1178	
U		1100,1206
W		1100,1206 115 (Tr. on Remand.)

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated this 26th day of October, 1963.

G. F. BONEY,

Counsel for Appellant